

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Implementation of Section 309(j))
of the Communications Act)
Competitive Bidding)

PP Docket No. 93-253 ✓

To: The Commission

**REPLY COMMENTS OF
THE ASSOCIATION OF AMERICAN RAILROADS**

The Association of American Railroads ("AAR"), by its undersigned counsel, hereby submits these reply comments in the Notice of Proposed Rule Making in the above-captioned proceeding.^{1/} The Comments addressed the Budget Act's requirement that the Commission award radio licenses through competitive bidding when two or more mutually exclusive applicants seek an initial license that principally will be used to provide communications service to subscribers for compensation.^{2/}

Radio communications play an essential role in railroad operations. The railroads' Private Land Mobile Radio Service ("PLMRS") facilities, regulated under Part 90 of the Commission's rules, operate primarily on 91 channels in the 160 MHz range and on 10 channels in the 450-470 MHz range. The railroads' Private Operation Fixed Service ("POFS") fixed point-to-point microwave

1/ These Reply Comments are timely filed pursuant to a Commission order extending the reply deadline to November 30, 1993. Order, DA 93-1426, released November 23, 1993.

2/ Pub. L. No. 103-66, 107 Stat. 312 (1993).

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facilities, regulated under Part 94 of the rules, are used to monitor and control more than 1.2 million freight cars on more than 215,000 miles of track. These POFS systems also relay critical telemetry data from trackside defect detectors located throughout the rail network, and are vital to coordination of operations among different railroads. Because the railroad industry is an extensive user of the radio frequency spectrum, holding licenses both in the PLMRS and POFS, it has a vital interest in the proceeding.

As AAR stated in its Comments, because the frequencies on which the railroad industry operate are shared by other user groups and because the railroads use the frequencies for internal operational purposes, railroad radio systems, both mobile and fixed, are not among the types of systems for which licenses must be awarded by competitive bidding as specified by the Budget Act. The comments filed by numerous parties support AAR's position and AAR would like to call attention to this support in four crucial areas.

**A. Mutual Exclusivity Cannot Exist Where
Channels are Shared by Numerous Licensees**

By its terms, Section 309(j) of the Budget Act only permits competitive bidding for radio licenses if mutual exclusivity exists among applications that have been accepted for filing. Thus, if mutual exclusivity among such applications does not exist, the use of competitive bidding to grant a license is not allowed by the Budget Act.

Numerous parties noted that in existing land mobile services, mutual exclusivity situations are uncommon due to the Commission's rules which require prior coordination and selection of specific frequencies in licensing radio spectrum services to avoid harmful interference situations.^{3/} Further, Telocator noted that Congress has stated explicitly that the advent of competitive bidding authority should not be "construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings."^{4/} Accordingly, these rules and procedures should not be disrupted.

The radio licenses used by the railroad industry, both in the PLMRS and the POFS services, utilize frequencies that are shared by numerous licensees on a coordinated basis. AAR agrees with the Commission's proposal that such frequencies will not be subject to competitive bidding because of the lack of exclusivity.

3/ See e.g. Comments of Telocator (filed November 10, 1993) at 21-22; Comments of Telephone and Data Systems, Inc. ("TDS") (filed November 10, 1993) at 4-5; and Comments of Industrial Telecommunications Association, Inc. ("ITA") (filed November 10, 1993) at 3.

4/ Telocator at 22, citing the Budget Act § 6002(a)(6)(E), 107 Stat. at 390; see also H.R. Rep. No. 213, 103rd Cong., 1st Sess. 481 (1993).

**B. Spectrum Used For Internal Operational Purposes
Should Not Be Subject to Competitive Bidding**

The second major criterion for competitive bidding requires that the "principal use" of the spectrum must involve the receipt of compensation from subscribers in return for the licensee's provision of the communication service. Commenting parties agreed with the Commission's interpretation that licenses for private services used for internal purposes should not be subject to competitive bidding.^{5/}

As AAR stated in its comments, the principal use of the railroad radio licenses in the PLMRS and POFS services is not for the provision of subscriber-based services. Rather, they are used principally to run the railroads and to support safer and more efficient railroad operations. Accordingly, such licenses should be excluded from the competitive bidding requirement.

**C. Majority or Average Use of a Class of Service
Providers is the Appropriate Principal Use Test**

The Budget Act requires that in order for competitive bidding to apply, the "principal use" of the spectrum must involve the transmission of communication signals to subscribers for compensation. Because there are some services where licensees may use the frequencies both to provide communications service to themselves and to offer communications service to

^{5/} See, Comments of American Automobile Association ("AAA") (filed November 10, 1993) at 3-4; Comments of APCO (filed November 10, 1993) at 3; Comments of E.F. Johnson Company (filed November 10, 1993) at 3-4; Comments of American Mobile Telecommunications Association ("AMTA") (filed November 10, 1993) at 6; Comments of Southwestern Bell Corporation ("SWB") (filed November 10, 1993) at 5; and Comments of American Petroleum Institute ("API") (filed November 10, 1993) at 4.

subscribers for compensation (for example, "mixed use" for fixed microwave point-to-point frequencies), the Commission sought comment on how to define "principal use."

The Commission proposed a definition that required at least a majority of the use of a service or class of service to be for service to subscribers for compensation, rather than for "private service." Alternatively, the Commission mentioned that it could adopt a definition that examined whether there is any use, no matter how minimal, in which one or more licensees within a given service or class of service use the spectrum for the provision of service to subscribers for compensation. If so, the entire class of service would be subject to competitive bidding.

AAR urged in its Comments that the Commission adopt the first approach for determining the "principal use" within a service or class of service. AAR wishes to note that, with the exception of Rochester Telephone and Pacific Bell and Nevada Bell ("PacTel"), the commenting parties were overwhelmingly in support of the Commission's first approach.^{6/} PacTel supports the "any use" test because it believes that like services should be treated similarly and that the "majority use" test will cause an administrative headache.^{7/} Likewise, Rochester Telephone contends that because some services may be used to provide

^{6/} See e.g., Comments of TDS at 5; Comments of API at 4-5; Comments of ITA at 4; Comments of APCO at 3; Comments of Domestic Automation Company (filed November 10, 1993) at 4-5; Comments of IVHS America (filed November 10, 1993) at 8; Comments of SWB at 6; Comments of AT&T at 19; Comments of AAA at 6-7; Comments of E.F. Johnson at 3-4; and Comments of UTC at 14-15.

^{7/} Comments of Pacific Bell and Nevada Bell (filed November 10, 1993) at 20.

service directly to end users for compensation, the Commission should determine on a case-by-case basis whether competitive bidding for such licenses should be used.^{8/}

Both parties fail to comprehend the inequities of applying a blanket rule to those classes of service which do not use or use only a minimal amount of spectrum for providing services to subscribers for compensation. Most of these services, such as in the case of the railroads, use their fixed microwave point-to-point frequencies for internal operational use or for "private service." Any use of these frequencies and facilities for the provision of services to subscribers is ancillary. Thus, subjecting these licenses to competitive bidding would unnecessarily increase the costs of internal railroad operations and force them to bid against SMRs for shared frequencies. These results are not what Congress intended by authorizing the Commission to grant spectrum licenses through competitive bidding.

AAR submits that exempting such services and classes of service from the competitive bidding requirement would be fully consistent with the intent of Congress with respect to the "principal use" criterion. Accordingly, AAR supports the Commission's proposal to exclude the POFS frequencies from competitive bidding.

^{8/} Comments of Rochester Telephone (filed November 10, 1993) at 7.

D. POFS Licensees That are "Forcibly" Relocated from the 2 GHz Band Should Not be Subject to Competitive Bidding

As AAR submitted in its Comments, the railroads support the Commission's conclusion that entities which are "forcibly" relocated from the 2 GHz band by the Commission's orders in ET Docket No. 92-9, should be exempt from competitive bidding for their replacement frequency. AAR notes that no party disagreed with the Commission's proposal.

E. Conclusion

The AAR supports the Commission's conclusion that railroad licenses in the Private Operational Fixed Service and Private Land Mobile Radio Services be exempt from competitive bidding because they utilize non-exclusive, shared frequencies and are used principally for internal operational purposes rather than for the provision of communications service to subscribers for compensation.

Respectfully submitted,

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November 30, 1993

CERTIFICATE OF SERVICE

I, Bridget Y. Monroe, hereby certify that on this 30th day of November, 1993, copy of the "Reply Comments of the Association of American Railroads" was served by first class United States mail, postage prepaid on the following parties:

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